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Subject:— Opinions on the cases under the Cotton Cloth and Yarn (Control) Orders, 1945.

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C O N T E N T S.

Legal Department File No. O/C.C.Y/48

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Clause 13 (1)(C)
Whether Mr. Pandharinath Garbad Bhavsar can ye held guilty under Cl. 13(c) for possessing un-marked cotton cloth.

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Whether the Directors of a Mill which is a limited company are not liable to be prosecuted on the ground that they cannot be punished on the basis of a vicarions liability

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Clause 14 (2)
Whether the firm M/s Inder Singh Bajaj can be prosecuted for holding unauthorised stocks which they declared in pursuance of the Press note issued by the Govt. of Bombay in the Times of India of 23-6-1947

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(Copies at mark)..

The following questions are raised by the Police Inspector, Food Control, Ratnagiri for consideration:-

i) Whether clause 12 of the Cotton Cloth and Yarn (Control) Order, 1945 which relates to the sale of cloth and yarn relates to the sale of sewing thread also;

ii) As the sewing thread tubes are not marked with the month and year of packing, how should the point that these particular tubes were packed after 15-7-46 be proved.

iii) Whether the spade variety of sewing thread falls under any variety mentioned in the schedule to T.C.'s notification No. TC(52)/46 dated 13-7-46.

Q.No.1. 'Yarn' is defined in clause 3(a) of the Cotton Cloth & Yarn (Control) Order, 1945 as any type of yarn manufactured either wholly from cotton or partly from cotton and partly from any other material. 'Sewing thread' is yarn as is obvious from the fact that the markings to be made thereon and prices etc. of such thread are controlled under the Cotton Cloth and Yarn (Control) Order 1945. The provisions of clause 12 of the Cotton Cloth & Yarn (Control) Order which apply to yarn apply to sewing thread as well.

Q.No.2. In this case the tubes were marked as follows:-

"40 of 500 yards spade manufactured by Jumna Thread Mills Ltd." Under clause 7 of T.C.'s notification No.TC(6)1/44 dated 16-2-44, the manufacturers are not required to stamp the month and year of packing on sewing thread tubes. In order to bring the offender under T.C.'s notification No.TC(52)/46 dated 13-7-46 it is necessary to prove that the tubes were manufactured after 15-7-46. It seems the retail price is marked on the tube as 0-2-9. As the provision regarding marking of the retail prices was made in T.C.'s notification No.TC(52)/46 dated 13-7-46 and as the prices

are marked on the tubes in accordance with those provisions, it is obvious that it was done after 13-7-46 in respect of goods packed after 15-7-46 The evidence of the mill on this point will be useful.

Q.No.3 The variety appears to fall under item 4 of the schedule. This is however not a legal point and the C.S.D. may consult the P.T.C. on this point.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to C.S.D.No. 1383 dated 9-2-48.

The Notification No. T.C. (14)/44, dated 39th December 1944, delegate only the function of issuing directions to any dealer. It is for the Department to verify whether the Textile Fabrics can be called dealers as defined in clause 3(b) of the Cotton Cloth and Yarn Control Order, 1943 Prima facie, they appear to be manufacturers, and if that be so, the notification cannot be resorted to for issuing the order. Even the notification No. T.C.(15)/44, dated 30th December 1944, would not seem to be applicable since it delegates the function of specifying the person or persons to whom cloth or yarn may be sold or delivered by any manufacturer or dealer to whom a direction has been or may hereafter be given by special or general order by the Textile Commissioner. No such direction seems to have been given and the delegation does not contemplate freezing. The Textile Commissioner of course has the power to order freezing and so too the Provincial Government under the Essential Supplies (Temporary Powers) Act subject to the provisions of section 3(1) thereof.

Sd/ P.M.Lad.
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Remembrancer of Legal Affairs.

U.R. to C.S.D. No.1512, dated the 11th February 1948.

VGP. 18-7-56.

In Morarka's case, the Privy Council held that the sanction for his prosecution given under clause 23 of the Cotton Cloth & Yarn (Control) Order, 1943, was not a valid sanction as it was not proved that the sanction was given in respect of the facts constituting the offence charged. In the judgement their Lordships have observed as follows:-

"It is plainly desirable that the facts should be referred to on the face of the sanction but this is not essential since clause 23 does not require the sanction to be in any particular form nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. In this case there is nothing on the face of the sanction and no extraneous evidence to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order and the sanction is invalid."

The sanction in that case was issued under the signature of the Dy. Secretary to Government. Such sanctions which did not contain the facts constituting the breach were held to be invalid by the H.C. Bombay in Emperor vs. J.C.D'souza 48 B.L.R. 754. Since then, the facts constituting the offences are being specified on the face of the sanction order. This was sometime in September, 1946. The Dist. Magistrates were authorised to issue sanctions under clause 23 of the Cotton Cloth and Yarn (Control) under G.N.C.S.D.No.564/VII dated 11-1-46. A circular was issued to the D.M's on 26th Feb.1947 stating that it was desirable that the particular act with which the accused was charged should be specified in the sanction order in addition to the clause and the sub-clause of the order contra-

vened by him. In view of this, there will be very few cases pending before the courts at present in which sanctions were defective. R.L.A. is requested to advise whether fresh sanction orders should be issued in such cases and also whether if this is done the trials will have to begin de novo.

There are two alternatives befor e Government It may either, with the permission of the Court, withdraw the cases in which sanctions given are defective and file fresh prosecutions after giving fresh sanctions or it may issue instructions to the authorities in Greater Bombay and the districts, in charge of conducting these cases to produce extraneous evidence to prove that the sanctioning authority knew the facts alleged to constitute the offence. These cases, as satated above, are few and may be at various stages of proceedings and the question which of the two alternative courses should be followed would depend upon the stage which they may have reached. Besides under section 494 Cr.Pc. the cases can be withdrawn only with the consent of the Court and if the Court does not permit withdrawal the case will have to proceed.

In cases where fresh sanctions are issued the trials will have to begin de novo since all proceedings held under a sanction order which is invalid would be void.

Sd/P.M.Lad.

Remembrancer of Legal Affairs.

O.R. to C.S.D. No. 99- Confl. dated 23-2-1948.

VGP. 18-7-56.

The accused in this case possessed hand-dyed and hand printed cloth. The accused had stated that it was all handloom cloth, but on examination it is found that part of it was handloom and part powerloom. Under these circumstances the District Government Pleader, West Khandesh in his opinion at page 91 ante has advised that the accused be prosecuted for contravention of clause 13 (1)(c) of the Bombay Cotton Cloth and Yarn (Control) Order, 1945. The District Magistrate, West Khandesh is, however, doubtful of the District Government Pleader's opinion and forwarded the papers to the Provincial Textile Controller with a request to state whether it would be advisable to sanction prosecution in this case.

2. The material part of clause 13 (1)(c) of the Bombay Cotton Cloth and Yarn (Control) Order, 1945, provides that where markings to be made and the time and manner of making them in respect of any class or specification of cloth have been specified under clause 10 or clause 10 B, no person other than the manufacturer thereof shall have in his possession or under his control any such cloth which is not marked unless it be for bona-fide personal requirements. It appears that for the purposes of this case; it would be necessary to consider three notifications under which markings etc. have been specified under clause 10 and 10 B viz., Government of India, Department of Industries and Civil Supplies notifications (1) No. T.C. (6)1/44, dated 19th February 1944, (2) No. 34 Tex A (15)-2/43 dated the 31st December 1943 issued under clause 10 and (3) Government Notification Civil Supplies Department Notification No. 195 dated 30th September 1946 issued under clause 10 B.

The first two notifications were issued by the Textile Controller under clause 10 of the Bombay Cotton Cloth

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and Yarn (Control) Order, 1943 and continued in force under clause 2 (2) of the Cotton Cloth and Yarn (Control) Order 1945. The first Notification prescribes the markings and manner of marking of cotton cloth and printed and dyed cloth also. (Vide clause 2 (1)). Under clause 7 only handloom cloth is exempted from its provisions. Para 4 of the second notification lays down the manner in which cloth packed by a manufacturer shall be marked. But under the said paragraph 4, the marking prescribed by the first Notification referred to i.e. of 19th February 1944 has been saved.

The third notification is issued by the Government of Bombay under clause 10 B. Para 3 of that notification lays down the manner of marking but this notification also saves marking prescribed by the first notification, i.e.of 1944,

Thus reading all the three notifications together, it is clear that the markings to be made and the time and manner of marking them in respect of hand printed and hand dyed powerloom cloth have been specified under clause 10.

From the Sub-Inspector's letter at page 39 ante it appears that the cloth was not marked at all. It is presumed that the cloth which bore the Malpur Dyers and Printers Associations tex marks was not marked according to the manner prescribed by the said notification. Consequently the accused can be rposecuted successfully for possessing the cloth in contravention of the provisions of clause 13 (1)(c).

Sd/P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to C.S.D.No.555, dated the 27-8-48.

VGP. 18-7-56.

The point of law raised in this case is whether the Directors of a Mill which is a limited company are not liable to be prosecuted on the ground that they cannot be punished on the basis of a vicarious liability.

2. The point arises out of the recent decision of the Privy Council in Srinivas Mall Bairoliya v. Emperor, 49 Bombay Law Reporter p.688 as interpreted and applied by our own High Court in Criminal Appeals 409 and 410 of 1947 (wherein Mr. Topiwala was prosecuted) and Criminal Appeal 559 of 1947 Imperator v.Mc.Mull (wherein Mr.Jasdenwala was prosecuted). It must now be taken as established law that the general proposition once laid down by our High Court that, where there is an absolute prohibition and no question of mens rea arises the master is criminally liable for the acts of his servant, cannot be accepted in its entirety. As pointed out by the Privy Council and later accepted by our High Court, offences which are within that limited and excep- class wherein mens rea need not be proved are usually of a comparatively minor character; and the offen of contravention of Orders made under the Defence of India Rules which are liable to be visited with heavy punishment do not fall within that limited class.

3. This established position of law does not, however, affect the liability of a Director or Manager etc. for which a special provision is made in section 9 of the Essential Supplies (Temporary Powers) Act, 1946. The contraventions of the Orders by these Mills are all punishable under this Act. Section 9 reads as follows:

> "If the person contravening the order made under section 3 is a company or other body corporate, every Director, Manager, Secretary or otherofficer or agent thereof shall, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, be deemed to be guilty of such contravention."

I may add that the offence in this case was committed while the Defence of India Rules were still in force; and even under those Rules a provision similar to section 9 was made in rule 122.

4. This provision (which it is now customary to introduce in almost all penal enactments offences under which are likely to be committed by corporations like companies) is borrowed from the Defence (General) Regulations of England, Regulation 91. In the case of a corporation it would not be possible otherwise to fix the responsibility upon any individuals; and it is obvious that corporation as a judicial person cannot be convicted and visited with the punishment of imprisonment. The provision, therefore is an artificial rule for fixing liability on individuals. It cannot be said to be oppressive; for every Director, Manager, etc is given the opportunity of proving his innocence and this helping the Court to fix the guilt upon the true culprit. The provision was interpreted in the case of Dean v.Hiesler, All England Law Reports 1942 Vol.2,p.340. At p.341 Tucker J. said;

> "The regulation shifts the onus in cases where the person convicted is a body corporate. In those cases it shifts the onus on to every person who, at the time of the commission of the offence was a director or officer of the body corporate to prove his innocence, and, if he fails so to do, he renders himself liable to the penalties imposed by the regulations, including, in certain cases, imprisonment."

In my opinion, therefore section 9 expects that where the offence is committed by a corporation like a company, every Director, Manager, Secretary or other officer or agent thereof is liable to be prosecuted, and it would be for him to establish that the contravention took place without his knowledge or that he had exercised all due dilligence to prevent such contravention.

5. The cases recently decided by the Privy Council and the Bombay High Court do not affect the

force of this section. They were not cases of limited companies or of corporations, but, were cases where the relationship merely of a master and servant was involved. No provision analgous to section 9 was contained in the enactment under which the prosecution was launched; and particularly in the case of Imperator v.Mc.Mull, Chagla C.J. was careful to point out that a provision dispensing with the necessity of establishing mens rea can be made as was done in the Hoarding and Profiteering Ordinance. Section 9 of the Essential Supplies (Temporary Powers) Act is a provision of that kind. The question of the relationship of a master and servant and of establishing the mens rea in the case of a master for an act primarily done by his servant would not arise. In such cases mens rea for a corporation would amount to no more than this that there must be an intention to do that which the Act prohibits. The real offender is the company, and under the provisions of section 9, there would be no legal objection to prosecuting every Director so long as on merits the evidence is sufficient for that purpose. In fact, that is the only feasible method of prosecution; for, if any individual from amongst the Directors, Manager, Secretary etc is selected it will always be open to him to escape responsibility by thrusting the blame on another person who has not been prosecuted.

Sd/P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to C.S.D. No.4722, dated the 17th May 1948.

VGP. 18-7-56.